

Cato Institute Policy Analysis No. -2: The Federal Election Commission

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Executive Summary

Many observers of federal regulatory agencies say that the groups an agency is supposed to regulate often influence the agency so much that it becomes their captive. Generally this process is believed to take place over a period of decades. In the case of the Federal Election Commission (FEC), incumbent officeholders who are supposed to be regulated by the FEC actually created the commission. An incumbent president nominates new members of the FEC when any vacancy occurs, and the six seats are staggered in such a way that a two-term president can fill all of them. Incumbent senators pass on the presidential nominees, and incumbent members of both houses of Congress pass on the FEC budget. Either house may veto any regulation proposed by the commission. Together they may amend the basic law that the FEC administers; and they generally amend it at least once during each election cycle.

The FEC is thus an agency created and controlled directly by many of the persons it is supposed to regulate. Through those persons, it is effectively controlled by the Democratic and Republican parties. Minor-party candidates, independent candidates, and nonincumbent candidates have little or no voice in the FEC. It is as though two television networks had established the Federal Communications Commission and carefully excluded all other networks and all independent stations from any participation in that agency's activities.

The results of incumbent domination and major-party domination of the FEC should not surprise anyone who has studied the gradual takeover of other regulatory agencies by those they were supposedly regulating. The results of discrimination against insurgent candidates are clear: There are fewer alternatives for the voters because some potential candidates do not run and others cannot be heard. Debate on campaign issues is weaker and more superficial than would be the case if genuinely different ideologies were competing. The debate goes from A to C instead of A to Z.

As passed in 1971, the Federal Election Campaign Act provided strict disclosure requirements for congressional and presidential candidates. But Common Cause and some powerful incumbents were not satisfied with the 1971 law. They wanted more stringent regulations, and they also wanted public subsidies for candidates. They used the Watergate revelations to push through the 1974 amendments, which tightened the rules, established the FEC, and provided public subsidies for presidential candidates. Although the 1974 law was passed in the name of "reform," the hearings preceding it indicated that members of Congress had other priorities in mind. And the members clearly dominated the hearings: A Senate subcommittee that took testimony on election reform in the spring of 1973 heard from twenty-six persons; fourteen of them were incumbent U.S. senators. A House subcommittee held similar hearings in the fall, and twenty-eight persons testified or submitted written statements. Of the twenty-eight, fifteen were congressional incumbents.[1]

On the House side, Barber B. Conable, Jr., (R-N.Y.) told a House subcommittee: "I have heard a Congressman say, 'I'll vote for any election reform bill; it" bound to hurt my opponent more than me.'"[2] A colleague, David R. Obey (D-

Wis.), told the same group: "We should not be in the business of encouraging minority parties. The two-party system has been the basic strength of American democracy." [3]

The law passed by Congress in 1974 placed severe restrictions on nonincumbent candidates, minority parties, and, in fact, on all political activists. The 1974 law limited every individual donation to \$1,000 per candidate per primary election and \$1,000 per candidate per general election. It also limited each donor to total contributions of \$25,000 per calendar year to all federal candidates. And it imposed spending limits on the candidates.⁴ The Supreme Court later found spending limits unconstitutional, except in the case of candidates who accept them as a condition of obtaining public subsidies.^[5]

The law allowed each candidate to receive up to \$5,000 per election from a political action committee. Such committees range from the AFL-CIO's Committee on Political Education (COPE) to the Business-Industry Political Action Committee (BIPAC) and to ideological groups such as the Council for a Livable World and the National Conservative Political Action Committee (NCPAC). As indicated below, these committees (generally called PACs) tend to give more heavily to incumbents than to challengers. The law allowed an individual to donate up to \$25,000 per year (later reduced to \$20,000) to the national committee of a political party. An independent candidate was not allowed to receive a similar sum; nor was the committee of the statewide Liberal party of New York.

While supporters of public funding were unable to obtain subsidies for congressional candidates, they did obtain them for certain presidential candidates. For all practical purposes, the subsidies were limited to major party candidates, although in theory minor-party candidates could qualify under certain conditions. The law established a matching-fund program for presidential primary elections, based on a 20/\$250/20 formula: A presidential candidate must find at least twenty people who will contribute at least \$250 each to his campaign in each of at least twenty states. When he raises this "threshold" amount, the Federal Election Commission certifies him and the U.S. Treasury begins matching -- dollar for dollar -- each contribution of \$250 or less. The government gave over \$30 million in matching funds to Democratic and Republican primary candidates in 1980.^[6]

General-election funding is available only to the presidential nominees of the Democratic and Republican parties. By 1980 a cost-of-living escalator clause had raised the grant to \$29.4 million for each nominee. Theoretically, the presidential candidate of a minor party could qualify for a smaller sum. But the law defines a minor party as one whose candidate received at least 5 percent of the popular vote in the last election; by this definition, there are no minor parties in the United States. A major party is one whose presidential candidate in the last election received at least 25 percent of the vote. All other parties, including ones that have existed for fifty years or more, are defined as "new" parties; their candidates are not eligible for preelection funding.

The law provides postelection funding for a new-party presidential candidate who receives at least 5 percent of the popular vote. But, as noted above, no new-party candidate has done so since the law was passed. Whether an independent (nonparty) candidate could qualify for public funding was in doubt until September of 1980. At that time, the FEC declared that independent John B. Anderson would receive public funding if he obtained 5 percent of the popular vote in November and if he met the other technical requirements. But the commission based its decision partly on the fact that Anderson had qualified as a party candidate in a few states. One commissioner dissented, saying that the FEC had evaded the basic issue and had forced Anderson "to engage in the same fiction he utilized for ballot access in states where he was denied independent status."^[7]

The law also provides public subsidies for the presidential nominating conventions of the two major parties. A cost-of-living escalator had raised the grant to \$4.4 million for each convention by 1980. The parties must meet all convention expenses from the grants, except that they may also receive substantial in-kind contributions from the host cities. "Minor parties" would be eligible for smaller subsidies if there were any minor parties. What the law defines as "new parties" are not eligible for convention subsidies even if their presidential candidates should later receive at least 5 percent of the popular vote. Since independent candidates are nominated by petition rather than by convention, they appear to be ineligible for convention subsidies. Some day, however, an independent presidential candidate may stage a nominating convention in order to obtain both media coverage and a public subsidy.

The Federal Election Commission supervises the subsidy awards, as well as the disclosure provisions and contribution

limits imposed by the law. In the case of candidates who receive public funding, it also enforces spending limits. The FEC has six voting members and two members ex officio. The latter are the secretary of the Senate and the clerk of the House, who have staff aides designated to act on their behalf. Of the six voting members, no more than three may be members of the same political party. In practice, this means that there are three Democrats and three Republicans.

Problems of Nonincumbent Candidates

Nonincumbent candidates (whom we will call "challengers") face overwhelming problems in trying to defeat incumbents, particularly in races for the House of Representatives. In 1978, for example, of those House members who ran for reelection, 93.7 percent won. Incumbent senators are more vulnerable; of those seeking reelection in 1978, 60 percent won. [\[8\]](#)

Challengers face many obstacles, most of which are made greater by the restrictions of the Federal Election Campaign Act. Most challengers have a severe disadvantage in what pollsters call "name recognition," which simply means that very few voters know them at the beginning of the campaign. "Not surprisingly, then, they gain more from campaigning than do incumbents. The evidence shows that the marginal utility of funds spent during a campaign is greater for challengers than for incumbents. That is, the more money they spend, the better they do; while spending by incumbents yields little or no effect on election outcomes." [\[9\]](#) This fact largely explains the enthusiasm of incumbents for imposing spending limits on challengers. Spending limits are included in most or all bills proposing public subsidies for congressional races. [\[10\]](#)

Contribution limits have the same general effects as spending limits. Especially when set as low as \$1,000 per donor, contribution limits make fund raising extremely difficult for challengers. A survey of 1978 congressional candidates found that one-half of the challengers had been hesitant about entering their races because they lacked funds. Most of the 1978 candidates "found fund raising extremely burdensome," and "felt that the federal campaign finance law had magnified this burden. This view was held particularly by challengers, and especially those challengers who were engaged in competitive races." [\[11\]](#)

At first glance the higher contribution limit for many candidate committees or PACs (\$5,000 per candidate per election) might appear to aid challengers, but in fact it helps incumbents far more. An FEC study of the 1978 congressional campaigns showed that incumbents received nearly 60 percent of the PAC contributions, while challengers received about 21 percent. Candidates running in open-seat contests (that is, where the incumbents were not standing for reelection) received 19 percent of the PAC contributions. [\[12\]](#) Another FEC study of the 1978 races showed congressional incumbents as a group outspending their challengers by \$73.3 million to \$61.9 million [\[13\]](#) Actually the margin is far wider than the FEC figures imply, because the FEC counts only official campaign spending. The government-supplied benefits of incumbents (congressional staff, district offices, the franking privilege, and so on) do not count as campaign spending, although they are enormously helpful to a member's reelection campaign. A recent study by Americans for Democratic Action estimates that the incumbent perquisites, or "perks," are worth nearly \$629,000 per year for each House member. [\[14\]](#) Comparing this figure with the average of contributions received by major-party challengers in 1978 -- only \$73,580 -- yields a more accurate picture of the challengers' overwhelming disadvantage. [\[15\]](#)

The question of whether government-supplied benefits should count as contributions was left unanswered by the 1974 version of the Federal Election Campaign Act. But the FEC interpreted the law as not including those benefits under the definition of "contribution." When challengers filed formal complaints with the FEC, alleging that their incumbent opponents had used district offices or congressional staff to aid their reelection campaigns, the FEC responded that the government was not a "person" and thus could not make a "contribution." [\[16\]](#) When Congress amended the law in 1979, it finally wrote the FEC interpretation into law. The House report accompanying the 1979 amendments suggested that other legal remedies may be pursued when incumbents unfairly use their official perks. The committee did not, however, say what those remedies might be. [\[17\]](#)

In 1979 and 1980 supporters of Sen. Edward Kennedy's presidential campaign charged that President Jimmy Carter

was using government staff, as well as his discretionary authority in making government grants, to support his reelection campaign. The Kennedy people claimed, with factual support, that government grants were flowing in unusually large amounts to those states holding early primaries or caucuses.^[18] They contended that government staff were making thinly disguised campaign trips on government time and money and that the government was reimbursed only partially or not at all for such trips. Several of the Kennedyites filed suit in federal court, seeking to halt such practices, but the district court dismissed their suit for lack of standing. The appeals court affirmed the dismissal, agreeing that the defendants lacked standing to sue but adding that "prudential limitations" also barred the action. The appeals court suggested that granting relief to the defendants would mean that a court "would have to interject itself into practically every facet of the Executive Branch of the federal government, on a continuing basis, for the purpose of appraising whether considerations other than pure public service motivated a particular defendant in the performance of his or her official duties."^[19] Like the House committee a few months earlier, the court did not suggest what other remedy a challenging candidate could pursue.

During the fall campaign of 1980, supporters of Republican nominee Ronald Reagan also charged the Carter administration with using governmental power on behalf of Carter's reelection. Trying to use publicity rather than judicial remedies, the Republicans filed Freedom of Information Act requests with government agencies to obtain specifics on officials' travel that might be related to the Carter campaign. And the Republican national chairman held a major press conference to denounce instances in which, he said, Carter administration officials had used government money to advance the Carter campaign.^[20]

It should be noted that an incumbent president, if he chooses to do so, also receives direct public subsidies for his campaign. Presidential incumbency, with its superior name recognition and its great power, is a valuable aid in raising private contributions to be matched by the government. In the 1980 primaries, for example, President Jimmy Carter received \$4.8 million in matching funds, while his nearest competitor received only \$3.6 million -- and this despite Carter's difficult political position.^[21]

Of course, most major presidential candidates are incumbents -- if not of the presidency, then of Congress or a governorship. Of the ten candidates who received matching funds in 1980, seven were incumbents (one president, three senators, two House members, and one governor of California). Of the nonincumbents, one was a former governor of California and another had held major federal posts. Most presidential contenders of the past also held high federal or state posts. But the federal election act, by placing such a high financial premium on incumbency, is making it nearly impossible for nonincumbents to compete. Georgia state senator Julian Bond, a politician of national reputation, was considering a presidential campaign in 1975. Bond decided against it when he found that "we just couldn't raise enough cash."^[22]

The federal election act made it illegal for him to borrow from a few persons the \$20,000 needed to start a direct-mail campaign. Bond's campaign manager said that forcing candidates to raise seed money in small amounts penalizes candidates who represent poor communities. "Julian's base," he said, "is the black community, and it's not a rich community."^[23]

Challengers at both congressional and presidential levels can compete effectively only if they are free to raise large sums of money to offset the overwhelming advantages of incumbents. They need not raise as much money as the incumbents receive through contributions and government-supplied benefits, but they must raise enough to make their names and issues known to the voters. The federal election act prevents most of them from doing so. Borrowing from the Scriptures, one might say that many are called. but few are heard.

Problems of Minor Party and Independent Candidates

Nearly all candidates outside of the major parties are challengers. In other words, they start their campaigns at a great disadvantage. To this must be added the special problems of nearly all candidates who are neither Democrats nor Republicans: -- poor coverage by the national news media, -- difficulties in obtaining ballot status in many states, -- problems caused by the disclosure provisions and the contribution limits of the Federal Election Campaign Act.

Although independent presidential candidate John B. Anderson received generous news coverage in 1980, his case was special. Unlike most independent (nonparty) candidates, Anderson was an incumbent, a member of the House of Representatives. And he had served for ten years as chairman of the House Republican Conference, a post that enabled him to become known to many Washington reporters. He started his 1980 campaign as a Republican candidate, obtained over \$2 million in matching funds for the Republican primaries, and participated in primary debates that received wide media coverage.^[24]

The minor-party candidates of 1980 received little news coverage by the national media. Their situation was like that of two 1976 presidential candidates, as described in the Progressive: "Roger MacBride of the Libertarian Party campaigned in forty states, including Alaska (where neither Ford nor Carter cared to venture). Peter Camejo [of the Socialist Workers party] traveled 150,000 miles, crisscrossing the country twenty times, in his quest for the presidency. Yet it is doubtful that even a quarter of those who went to the polls . . . had heard of either of them, much less of the platforms they sought to publicize."^[25]

Lack of media coverage is a severe handicap in fund raising. It also increases the difficulty of obtaining ballot status in the states. Ballot status must normally be obtained by petition signatures, and voters are reluctant to sign for candidates they know nothing about. Many of the states also present serious technical obstacles: high signatures requirements, early filing deadlines, short periods for gathering signatures, distribution requirements, and so forth. Although many discriminatory state laws have been struck down, many obstacles remain. Petition drives and litigation require large sums of money; minor-party and independent campaigns generally find that they have little money left over for advertising. Yet they desperately need advertising to make up for lack of news coverage.^[26]

Candidates running outside of the major parties also face special difficulties imposed by the Federal Election Campaign Act. The paperwork burden of the disclosure requirements is enormous, especially for small campaign committees that must depend largely on volunteers. As two observers of the 1976 campaign noted, "Third parties got none of the benefits from the new campaign financing laws and all of the hassles." They quoted an officer of the Socialist Labor party: "What killed us this year was all the liberal reform provisions and the tons of paperwork that came with them."^[27]

A national party is limited to receiving \$20,000 per year from an individual donor. This limit is a greater problem for minor parties than for the Democrats and Republicans because the former start from a much smaller base of donors. Moreover, the \$1,000 contribution limit applies to presidential and congressional campaigns. Again, this is a greater problem for minor-party candidates because of their smaller initial base of givers. It is instructive to contrast the 1976 presidential spending of the majors and the minors: The Republican nominee for president spent \$35 million; the Democratic nominee spent \$34 million; the Communist party nominee spent roughly \$504,000; Eugene McCarthy (independent) spent \$442,000; the Libertarian party nominee, \$387,000; the American party nominee, \$187,000; the U.S. Labor party nominee, \$180,000; the Socialist Workers party nominee \$151,000; the Socialist Labor party nominee, \$59,000; and the American Independent Party nominee, \$44,000.^[28]

In the 1976 Buckley v. Valeo case, minor-party and other plaintiffs attacked nearly every part of the Federal Election Campaign Act. The Supreme Court struck down most spending limits as a result of Buckley, but it upheld the contribution limits. Joel Gora, one of the attorneys who fought the case for the plaintiffs, later said that "from one perspective the independents and the minority parties really came away with nothing from that decision. What the Court did by eliminating the restrictions on spending really has no significance for a minority party candidate. They would never hope to raise the kind of money that would get them up to the limit anyway. But there are an awful lot of minority party and independent candidates who rely on a few financial angels for the bulk of their campaign funds. By upholding the limitations on contributions, the Supreme Court cut off their ability to raise funds to a huge degree."^[29] It should be added that, as in the Julian Bond case noted earlier, inability to raise large contributions leads to inability to raise small contributions from many donors through direct mail.

In 1976 the independent presidential campaign of Eugene McCarthy was handicapped more severely than the minor-party campaigns because McCarthy was not supported by a national party that could receive contributions up to \$20,000. His campaign representatives asked the Federal Election Commission to treat one of the McCarthy

committees as the equivalent of a political party for purposes of the contribution limits. The commissioners deadlocked on the issue, thus failing to answer the campaign's request for an advisory opinion. All three of the Democratic commissioners voted against the McCarthy request. (This was during the period when the Democratic party was engaged in a major effort to remove McCarthy's name from the ballot in New York, where they viewed him as a threat to Carter's chances of carrying the state in November.)^[30] The 1980 Anderson independent campaign, facing severe financial problems, went to federal court in an effort to gain what the FEC had refused to give the McCarthy campaign.^[31]

It would be hard to overestimate one final problem for minor parties and independent campaigns: the granting of huge public subsidies, in the range of \$100 million per presidential election, exclusively to the major parties. The Supreme Court, in *Buckley v. Valeo*, upheld this discrimination over the dissents of Justice William Rehnquist and Chief Justice Warren Burger. Rehnquist protested that Congress "has enshrined the Republican and Democratic Parties in a permanently preferred position," saying that this infringed upon the First and Fifth Amendments.^[32] The chief justice quoted approvingly the words of Sen. Howard Baker (R-Tenn.), who had said during Senate debate on the election act: "I think there is something politically incestuous about the government financing and, I believe, inevitably then regulating the day-to-day procedures by which the government is selected.... I think it is extraordinarily important that the government not control the machinery by which the public expresses the range of its desires, demands, and dissent." Burger added: "I see grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates. This Court has, until today, been particularly cautious when dealing with enactments that tend to perpetuate those who control legislative power."^[33]

In upholding discrimination against minor parties and independents, the Court majority quoted briefly from a previous case that, in turn, had referred to James Madison's No. 10 of *The Federalist* papers and had indicated that Madison opposed "splintered parties and unrestrained factionalism."^[34] They thus implied that he had warned against a many-party system. In this, the Court majority was standing *Federalist* No. 10 on its head. Like all of the Founding Fathers, Madison worried about the effects of factions or parties, but he clearly thought that, the greater the number of factions, the fewer the chances that one faction would dominate and oppress the others. He thought that the geographical size and the republican nature of the United States would lead to many parties, and he thought this a great advantage. In *Federalist* No. 10, Madison asked whether the advantage that a republic has over a democracy consists partly "in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest?" And he answered, "In an equal degree does the increased variety of parties comprised within the Union increase this security."^[35]

Other Founding Fathers favored what today we call independent or nonparty politics. George Washington, in his Farewell Address, warned his fellow citizens "in the most solemn manner against the baneful effects of the spirit of party, generally."^[36] John Adams once said: "While all other sciences have advanced, that of governments is at a stand; little better understood, little better practiced now than three or four thousand years ago. What is the reason? I say, parties and factions will not suffer improvements to be made."^[37] In 1789 Thomas Jefferson wrote: "I am not a Federalist, because I never submitted the whole system of my opinions to the creed of any party of men whatever in religion, in philosophy, in politics, or in anything else where I was capable of thinking for myself. Such an addiction is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all."^[38]

If the Supreme Court takes a closer look at the historical record it may reach different conclusions on party establishment and public subsidies than it did in *Buckley*.

Problems of All Candidates and Political Activists

If the outcasts of the political system were the only people harmed by the federal election act and the FEC, there would be little hope for change or repeal of the law. But the last five years have produced much evidence that the law and the commission harm all candidates and everyone involved in politics. The examples given below indicate the range of the problems.

The law clearly limits the extent to which candidates and political activists can express their views. In the important Pennsylvania primary of 1976, for example, the Democratic presidential candidates were burdened by a temporary cutoff of public funding at the same time that they were restricted by the contribution limits. Governor George Wallace's campaign manager reported at the time: "There are no funds to purchase media with; radio, television, newspaper advertising is out of the question."^[39] Senator Birch Bayh (D-Ind.) had already suspended his campaign; Bayh's top fund-raiser remarked that the election act "makes it impossible to campaign in all the primaries and do an adequate job."^[40] Later that year, a Republican county chairman in New York was photographed as he stood on a ladder, painting over the name of Gerald Ford on a campaign sign. The FEC had said (in a decision later changed by congressional amendment of the law) that a local party committee could spend no more than \$1,000 on behalf of its national ticket. The county committee in question had gone over the limit with its signs -- thus the painting-out of the president's name.^[41]

In 1979, volunteers in many states were trying to draft Sen. Edward Kennedy (D-Mass.) for president. The draft committees were afraid to talk to one another across state lines for fear of jeopardizing their receipt of large contributions. The FEC allowed draft committees supporting the same candidate to accept contributions up to \$5,000 per donor -- but only if those committees were not cooperating on strategy, fund raising, and so on. Although the Draft Kennedy groups tried to be careful, they were soon the target of a formal complaint to the FEC by President Carter's campaign committee.^[42] Later in 1980, through an FEC complaint and a federal lawsuit, the Carter force tried to prevent "independent spending" on behalf of Ronald Reagan's campaign by several conservative committees. And the Carter group sent to television broadcasters throughout the country a letter warning them of possible legal problems if they sold broadcast time to the pro-Reagan committees.^[43]

Election-act restrictions also make campaigning a more complex and bureaucratized activity than it used to be. Candidates and campaign managers find that they must constantly seek the advice of lawyers on the legality of fairly simple actions. Many turn to the FEC, asking for advisory opinions that give them protection from subsequent legal action. According to the Los Angeles Times, in early 1980 the FEC responded to a Kennedy campaign query by saying that "if an advance man is sitting in the Washington campaign headquarters and thinking about Iowa, his salary for that part of his time has to be subtracted from the candidate's Iowa spending limit." The newspaper also quoted a Republican campaign aide, who said, "You don't ask a dumb question like that. You end up getting just the kind of dumb answer you deserve. The only problem is that it affects all of Us."^[44]

The bookkeeping and reporting problems are serious for all campaigns. After the 1978 election, the manager of a successful Republican campaign for the Senate said that his committee had spent much money for an accounting firm and had detailed three staff members to meet FEC bookkeeping requirements. He added, "We got to the point where we almost dreaded seeing a \$5 contribution come in. And that's bad, because we should be encouraging the small contributor."^[45] And in 1979 the presidential campaign manager of Rep. Philip Crane (R-Ill.) explained that ideally the Crane campaign would have had an accountant in each state headquarters to meet all FEC reporting requirements. But they could not do that, so they arranged for each state committee to send the money they raised to the national committee: "We bank it and send a check back to them. It's an inconvenience to avoid spending a lot of money on accounting, but it forces us to take on a centralized, bureaucratic type structure." He added, "We don't like to operate that way. We'd prefer for our state organizations to be more autonomous."^[46]

FEC compliance procedures are also a problem for any campaign that must endure them. There have been complaints that the FEC pays excessive attention to possible violations by losing candidates and not nearly enough attention to incumbents. Conservative fund-raiser Richard Viguerie once remarked that "the people who administer laws aren't dummies. They aren't taking on their bosses. They're going to pick on the cripples. They're not about to go after Tip O'Neill. They go after the defeated and the minor candidates."^[47] But by filing a formal complaint with the FEC, a political opponent can trigger the FEC compliance process against even a powerful incumbent. Many House and Senate candidates file complaints against their opponents; often the opponents return the favor. As noted previously, President Carter's committee filed major complaints against the Draft Kennedy groups in 1979 and against committees backing Ronald Reagan in 1980. Many political committees file complaints against their ideological opponents: the National Abortion Rights Action League against right-to-life groups; the National Right to Work Committee against

labor groups; the National Committee for an Effective Congress against conservative groups.

There are two advantages in using the FEC to harass one's political opposition. First, release of the complaint to the press ensures bad publicity for the opposition. In 1976, for example, the National Committee for an Effective Congress (NCEC) filed a complaint against the conservative Committee for the Survival of a Free Congress (CSFC) about one week before the election. According to the CSFC director, three days before the actual filing of the complaint: "NCEC issued its own press release detailing the complaint not only to the media, but also to all NCEC-supported candidates who were opposed by New Right PACs, such as CSFC. While the media had the story, the CSFC was unable to get a copy of the complaint from the FEC for ten days. We finally had to get a copy of the press release from NCEC." Although the CSFC thought the complaint was baseless and asked for its dismissal, the FEC took no action before the election. Over one year later, the FEC found that there was no basis for the charges and closed the case.^[48]

Second, a complaint often leads to an investigation -- and sometimes litigation -- that is time-consuming and expensive. It is difficult to find figures on costs of the compliance process, but one target of a complaint initiated within the FEC told an inquirer that the costs of fighting the FEC were so high that he had to quit: "My attorney thought that we could beat them if we went higher, but we spent \$12,000 in legal fees . . . and finally gave up."^[49] It seems safe to assume that legal costs in more lengthy and complicated cases are far higher.

In summary, the way the system works for those who wish to harass their opposition is this: They load the cannon, and the FEC fires it. The battle may last for a year or more. The only people who emerge with no wounds or scars are the ones who started the fight.

What Should Be Done

There have been many proposals to amend the Federal Election Campaign Act to correct its many failings. The amendments passed by Congress in 1979 made slight improvements by reducing the reporting burden and giving a few due-process guarantees to persons involved in the compliance process, but those changes are minor when compared with the basic problems presented by the law.

The most basic problem is that the election act violates the First Amendment guarantees of freedom of speech and freedom of association. Limiting the amounts of money that can be raised and spent on campaigns limits the free speech of a candidate just as surely as binding and gagging him. The law's strange distinction between "contributions" and "independent spending" results in situations where people supporting the same candidate literally cannot talk to each other. And government financing and regulation of politics involves a conflict of interest far more dangerous than the financial kinds because major-party incumbents now control their opposition.

The dangers of government regulation and funding were expressed well by Eugene McCarthy when he compared today's campaigns with the American Revolution. Election campaigns, after all, are often efforts to overthrow an administration through peaceful means. This is the situation of minor parties, including even the Republican party when it does not control the government. When this is kept in mind, the McCarthy analogies have special relevance.

During the American Revolution, he said, "One of the complaints was that the Crown was controlling politics in this country and controlling government. We now say that the government can control politics and through politics it can control the government, which really closes the whole circle as I see it." He asked people to imagine King George III saying to the colonists, " 'Why don't you raise a few thousand pounds? We will provide matching funds, and you can run a pure revolution with matching funds from the Crown. We will have a few things to say about how you run the revolution and where it goes . . . ' " Pointing to the crucial importance of the right to organize, McCarthy remarked: "If Patrick Henry had given a speech and Sam Adams and James Otis had given speeches and there were no organization, then there would have been no Revolution."^[50]

The basic problems presented by the election act and the FEC cannot be solved by occasional tinkering with the law, by minor amendments, or even by major amendments. They can be solved only by repealing the law and abolishing the FEC.

What would remain? The First Amendment. As one of the attorneys who argued the Buckley v. Valeo case told the Supreme Court: "The greatest campaign reform law ever enacted was the First Amendment...."^[51]

Notes

1. U.S., Congress, Senate, Committee on Rules and Administration, Subcommittee on Privileges and Elections, Hearings on Federal Election Reform, 93rd Cong., 1st sess., April and June, 1973; and House of Representatives, Committee on House Administration, Hearings on Federal Election Reform, October and November, 1973.
2. Ibid., p. 269.
3. Ibid., p. 295.
4. Public Law 93443, 93rd Cong., 15 October 1974. See also U.S. Federal Election Commission, Federal Election Campaign Laws (Washington, D.C.: U.S. Government Printing of five, January 1980). These are the basic sources for explanations of the law in this paper.
5. Buckley et al. v. Valeo, Secretary of the United States Senate, et al., 424 U.S. I at 57 n. 65 (1976). (Then-Senator James L. Buckley of New York and former Senator Eugene J. McCarthy of Minnesota were among the plaintiffs in this case.) See also Republican National Committee et al. v. Federal Election Commission et al.. 616 F.2d 1 (1980).
6. U.S. Federal Election Commission, "FEC Approves Matching Funds for 1980 Presidential Candidates," News Release, 4 September 1980, 1 p. Technically there must be a twenty-first donor in each state, although that donor may give any small amount.
7. U.S. Federal Election Commission, Advisory Opinion 1980-96, 4 September 1980, and "Dissenting Opinion of Vice-Chairman John Warren McGarry to Advisory Opinion 1980-96."
8. "Reselection Success of Incumbents," Congressional Quarterly Weekly Report, 5 April 1980, p. 908.
9. U.S. House of Representatives, Committee on House Administration, An Analysis of the Impact of the Federal Election Campaign Act, 1972-78, prepared by the Institute of Politics, Harvard University (Washington: U.S. Government Printing Office, 1979), p. 56. This publication will be referred to subsequently as "Harvard Study."
10. For example, see H.R. 1, 95th Cong., 1st Sess., 15 January 1979
11. Harvard Study, p. 53.
12. U.S. Federal Election Commission, "FEC Releases New Interim Summaries of Non-Party Political Committee 1977-78 Financial Activity," News Release, 24 January 1979, p. 1.
13. U.S. Federal Election Commission, Untitled News Release, 29 June 1979, p. 1.
14. Writer's telephone conversation with ADA staff member Harry Margolis, 15 September 1980. At this writing, the ADA study has not yet been published.
15. This figure is based on preliminary figures (as of March 1979) in Harvard Study, p. 28.
16. U.S. Federal Election Commission, Advisory Opinions 1976-34 and 1976-44; and Matters Under Review 672, 679, 808, 851, and 916.
17. U.S. House of Representatives, House Report No. 96422, 7 September 1979, pp. 6-7.
18. Timothy B. Clark, "Carter Plays Santa Claus for His Reelection Campaign," National Journal, 5 April 1980, pp. 548-53. An earlier report pointed to the other side of the coin: a challenger's difficulty in raising money from people who are "reluctant to jeopardize pending federal contracts, cases before regulatory agencies, and special legislation

before Congress by contributing to a non-incumbent threat like Kennedy." See Morton Kondracke, "The Fundraising Tally," *The New Republic*, 23 February 1980, p. 13.

[19.](#) William W. Winpisinger et al. v. Jack Watson et al., C.A. No. 79-3471 (D.C. Cir., 10 April 1980).

[20.](#) Edward Walsh, "Carter Accused of Abusing Power," *Washington Post*, 12 September 1980, p. A-3. See also Edward Walsh, "As Federal Funds Flow to Chicago, Mayor Byrne Returns to Carter Fold," *Washington Post*, 10 September 1980, p. A-3.

[21.](#) The figures are from U.S. Federal Election Commission, "FEC Approves Matching Funds for 1980 Presidential Candidates." Edward Kennedy was Carter's nearest competitor. A third Democratic contender, Gov. Edmund G. Brown, Jr., of California received about \$892,000 in matching funds.

[22.](#) Quoted in the *New York Times*, 12 July 1975, p. 22.

[23.](#) James G. Bond, quoted in Michael J. Malbin, "New Campaign Finance Law Faces Legal, Political Tests," *National Journal*, 12 July 1975, p. 1018.

[24.](#) Another theory holds that Anderson received wide coverage because he posed no major threat, and offered no radical alternative, to the economic and political status quo. See Mary Meehan, "The Establishment Alternative," *Commonweal*, 12 September 1980, pp. 500-502. Running as an independent for president in 1976, Eugene McCarthy received far less coverage than Anderson. See William Adams, "Make-or-Break Coverage," *Washington Star*, 24 August 1980, pp. G-1 and G4.

[25.](#) Jim McClellan and David E. Anderson, "The Making of the Also-Rans," *The Progressive*. January 1977. D. 27.

[26.](#) Ibid. See also John C. Armor and Philip L. Marcus, "The Bloodless Revolution of 1976," *American Bar Association Journal*, August 1977; Roger MacBride, "How the Repression of Political Ideas Is Managed in America," *Libertarian Review*, August 1977; Eugene J. McCarthy, *The Ultimate Tyranny: The Majority Over the Majority* (New York: Harcourt Brace Jovanovich, 1980); Rhodes Cook, "Money Woes Limit Anderson, Third Party Presidential Bids," *Congressional Quarterly Weekly Report*, 16 August 1980; Richard J. Walton, "Up Against the Ballot: The Two Party Monopoly," *The Nation*, 30 August/6 September 1980; David Wood, "Getting on All State Ballots Was Costly for Anderson," *Washington Star*, 21 September 1980.

[27.](#) McClellan and Anderson, "Also-Rans," p. 29 (quoting Stan Karp) .

[28.](#) Herbert E. Alexander, *Financing the 1976 Election* (Washington: Congressional Quarterly Press, 1979), pp. 171, 172, 175. (Figures have been rounded.) Adding the campaign debts of the minors would raise their spending figures but would not change the overall picture very much.

[29.](#) Quoted in "And What Must Be Done for 1980: A Conversation with Joel Gora," *The Civil Liberties Review*, September/October 1977, o. 23.

[30.](#) U.S. Federal Election Commission, Minutes of Commission Meeting of October 14, 1976, pp. 4-5. Court battles over McCarthy's ballot status in New York were reported in the *New York Times*, 9, 27, and 28 October 1976; *New York Post*, 22 and 28 October 1976; *Washington Post*, 30 October 1976.

[31.](#) John B. Anderson et al. v. Federal Election Commission, C.A. No. 80-0272P. U.S.D.C. (District of Maine, filed 5 September 1980).

[32.](#) *Buckley v. Valeo*, 293 (Rehnquist, J., dissenting).

[33.](#) Ibid., 248, 251 (Burger, C.J., dissenting).

[34.](#) Ibid., 96, quoting *Storer et al. v. Brown, Secretary of State of California. et al.*. 415 U.S. 724 at 736 (1974).

- [35.](#) Alexander Hamilton, James Madison, and John Jay, *The Federalist* (Cambridge, Mass.: Harvard University Press, 1961), p. 135.
- [36.](#) *The Writings of George Washington* (Washington: U.S. Government Printing Office, 1940), vol. 35, p. 226.
- [37.](#) John Adams to Thomas Jefferson, 9 July 1813, in *The Works of John Adams* (Boston: Little, Brown & Company, 1856), vol. 10, p. 50.
- [38.](#) Thomas Jefferson to Francis Hopkinson, 13 March 1789, in *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1958). vol. 14, p. 650.
- [39.](#) Charles Snider, quoted in Lyle Denniston, "The 'Frills' Are Gone as Candidates Pay Their Own Way," *Washington Star*, 15 April 1976, p. A-10.
- [40.](#) Myer Feldman, quoted in Stephen Isaacs, "Most Candidates Running in The Red," *Washington Post*, 15 April 1976, p. A-4.
- [41.](#) "Altering Campaign Signs," *New York Times*, 30 September 1976, p. 45.
- [42.](#) Martin Schram, "FEC Asked to Equalize Donation Limits," *Washington Post*, 4 October 1979, pp. A-1, A-10.
- [43.](#) Alison Muscatine, "Democrats Sue to Bar FEC Funds for Reagan," *Washington Star*, 3 July 1980, p. A-3; Bill Peterson, "Carter Camp Sues to Block Reagan From Collecting Full Campaign Fund," *Washington Post*, 24 July 1980, p. A-5; "Campaign Notes," *Washington Post*, 23 July 1980, p. A-3; and Timothy G. Smith, letter to broadcasters, Washington, D.C., 18 July 1980, 3 pp.
- [44.](#) Unidentified Republican aide, quoted in Eleanor Randolph and Ronald J. Ostrow, "Maze of Laws Forces New Campaign Strategy," *Los Angeles Times*, 28 January 1980, p. 15.
- [45.](#) Alvin Smith, quoted in Daniel Rapoport, "Campaign Politics -The Telltale Signs of a Regulated Industry," *National Journal*, 20 January 1979. D. 94.
- [46.](#) Jerry Harkins, quoted in William J. Lanouette, "Complex Financing Laws Shape Presidential Campaign Strategies," *National Journal*, 4 August 1979, p.1283
- [47.](#) Richard Viguerie, quoted in Daniel Rapoport, "Campaign Politics," p. 95.
- [48.](#) Paul M. Weyrich, "The New Right: PACs and Coalition Politics," in Michael J. Malbin, ed., *Parties, Interest Groups, and Campaign Finance Laws* (Washington: American Enterprise Institute for Public Policy Research, 1980), pp. 69-70.
- [49.](#) Unidentified person, quoted in Carol F. Lee, "The Federal Election Commission, the First Amendment, and Due Process," *The Yale Law Journal*, May 1980, p. 1205, n. 36. On due-process problems, see also John R. Bolton, "Government Astride the Political Process," *Regulation*, July/August 1978, pp. 46-55.
- [50.](#) Eugene J. McCarthy, in U.S. House of Representatives, *Hearings on Public Financing of Congressional Elections*, 95th Cong., 1st sess., May-July 1977, pp. 63, 68; and in John B. Anderson et al., *Regulation of Political Campaigns-How Successful?* (Washington: American Enterprise Institute for Public Policy Research, 1977), p. 30.
- [51.](#) Ralph K. Winter, Jr., in U.S. Supreme Court, *Transcript of Oral Arguments in Buckley v. Valeo*, Nos. 75-436 and 75-437, Washington, D.C., 10 November 1975, p. 31.